RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NEW MEXICO STATE UNIVERSITY IN SUPPORT OF DEFENDANT STATE OF NEW MEXICO

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), New Mexico State University ("NMSU") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Defendant State of New Mexico. All parties to this matter have consented to the filing of this *amicus curiae* brief except the State of Texas. Counsel for Defendant State of Colorado gave consent by email and respective counsel for Defendant State of New Mexico and Plaintiff in Intervention United States consented by letters lodged with the Clerk of this Court.

NMSU contends the Special Master's First Interim Report does not adequately consider the existence of groundwater rights. As a long-standing ground and surface water rights holder, NMSU will bring a perspective missing in these proceedings. Since its founding in 1890, NMSU has continuously made use of and relied on ground and surface water and for decades has actively participated in the state adjudication and administration of water rights in the lower Rio Grande of New Mexico.

The Report seemingly would negate the validity of lawful rights to the use of groundwater serving a population of over 200,000 people in the Mesilla Valley of New Mexico, including more than 18,000 university students, faculty and staff. By ignoring groundwater, the Report also overlooks the legal and practical requirement that ground and surface water uses from an

interconnected water resource such as the Rio Grande Basin of New Mexico must be adjudicated and administered together, under state law. The Report's recommendation that the U.S. Bureau of Reclamation take over administration of surface water, while leaving the State of New Mexico to administer groundwater, is not practical. It also contradicts this Court's repeated recognition of federal deference to state authority over intrastate water resources.

Finally, the Report recommends that the United States be permitted to make claims under reclamation law before this Court. NMSU doubts such claims can be heard in the absence of thousands of other water rights claimants who are not before this Court and are already joined in the state court proceedings. As one such party, NMSU seeks to appear as *amicus curiae* to argue that any claims asserted here by the United States may not affect the claims of unjoined claimants such as NMSU.

NMSU respectfully requests that it be granted leave to file the accompanying brief as *amicus curiae* in support of Defendant State of New Mexico.

June 9, 2017

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

New Mexico State University ("NMSU") holds perhaps the oldest combined ground and surface water rights in the lower Rio Grande of New Mexico. Since its founding in 1890, NMSU has served as the State of New Mexico's land grant university. It uses both groundwater from its own wells and surface water supplied by the Rio Grande Project for irrigation of university agricultural lands, especially at its experimental and educational facilities. NMSU's main campus is located in Las Cruces and has continuously used groundwater for higher educational purposes for 127 years.

For three decades NMSU has litigated in the state court that is adjudicating all water rights of the lower Rio Grande in New Mexico. NMSU participated in appeals to the New Mexico Court of Appeals and later to the Tenth Circuit, in which each court held the state court is the appropriate forum to adjudicate water rights in the lower Rio Grande of New Mexico. In *Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, the New Mexico Court of Appeals held the state court proceedings encompass a comprehensive stream system in compliance with both state law and the federal McCarran Amendment. 849 P.2d

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[1] No person or entity other than *Amicus Curiae* NMSU authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief. *Amicus Curiae* NMSU provided timely notice to the parties of its intent to file this brief and has been advised that New Mexico, Colorado, and the United States consent to the filing of this brief. Texas withheld consent. With this brief NMSU has filed a motion for leave.

372, 378-379 (N.M. Ct. App. 1993), cert. denied, 849 P.2d 372 (N.M. 1993). Similarly, the Tenth Circuit abstained from hearing the United States' separate suit filed in the U.S. District Court of New Mexico to quiet title to its water rights in the Project. *United States v. City of Las Cruces, et al.*, 289 F.3d 1170 (10th Cir. 2002). Both appellate courts applied this Court's holding in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976), in favor of state jurisdiction over water.

NMSU appears as *amicus curiae* in this original action to assert the validity of its and other water rights vested under New Mexico law and the concomitant state jurisdiction over such rights, both surface and ground.

SUMMARY OF ARGUMENT

This brief addresses the neglected issue of groundwater. Although several hundred pages in length, the Special Master's First Interim Report largely confines its analysis to surface water apportioned by the Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785, and omits consideration of the groundwater resource, with significant and unwarranted implications to groundwater rights and state authority over intrastate waters. NMSU offers this *amicus* brief in support of exceptions to the Report filed by the State of New Mexico.

The Report recommends (1) denial of the State of New Mexico's Motion to dismiss the Complaint filed by

the State of Texas, *id.* at 217, and (2) granting of New Mexico's motion to dismiss the United States' Complaint in Intervention regarding claims under the Compact but recommends extending nonexclusive jurisdiction pursuant to 28 U.S.C. § 1251(b)(2), to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Project. Report at 237. The Report also makes recommendations on two motions to intervene.

NMSU does not contest the Report's conclusion that Texas states a claim under the Compact or that New Mexico's motion to dismiss should be denied. Instead, NMSU asks the Court to reject the Report's unnecessary and unsupported reasoning that ignores long-standing and valid groundwater rights in the Mesilla Valley of New Mexico and disregards well-accepted federal law that long ago granted jurisdiction to the Western States over their own waters. Nor does NMSU contest the Report's recommendation to hear the United States' related interstate claims, if any, pursuant to 28 U.S.C. § 1251(b)(2), so long as resolution of the federal claims is necessary for resolution of the Compact claims in this case. NMSU asks the Court to refrain from hearing claims of the United States that duplicate its claims already before the New Mexico state court adjudicating all claims to waters of the lower Rio Grande in New Mexico, *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (N.M. 3rd Judic. Dist.) ("LRG Adjudication")

or from granting relief already within the administrative authority of the State of New Mexico.[2]

I. The Report makes the mistake of analyzing rights to and jurisdiction over surface water without considering the existence of and consequences to vested groundwater rights. The Report seems merely to assume that ground and surface water are the same resource, contrary to western water law and a specific holding in the LRG Adjudication. NMSU does not dispute that hydrologically interconnected ground and surface water must be administered together to avoid impairment of senior water rights. Nonetheless, available groundwater in storage is a precious resource that can and should be put to beneficial use. In the lower Rio Grande of New Mexico more than 200,000 people use and rely on this essential groundwater resource. All non-agricultural water users and all farms with irrigation wells depend on groundwater. The Report's reasoning unjustifiably challenges the validity of the groundwater rights of NMSU and every other groundwater user and threatens the economy and livelihood of the region.

II. The Report misses an entire body of water law dealing with unified administration of water rights and never cites or discusses the McCarran

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[2] NMSU also urges the Court to reject the Report's extensive recitation of historical facts obtained independently by the Special Master through extrinsic documents that goes well beyond the appropriate scope for consideration of a motion to dismiss. Because NMSU understands that other parties or *amici* will argue this point, NMSU does not duplicate those arguments here.

Amendment, 43 U.S.C. § 666(a), or the Court's seminal federalism holdings in *Colorado River* and *California v. United States*, 438 U.S. 645 (1978). Both the McCarran Amendment and New Mexico's adjudication statutes require unified adjudication and administration of all water uses, from whatever source. The Report's proposed elimination of the State of New Mexico's jurisdiction over its own compacted water, *id.* at 211-217, is not necessary to afford either Texas or the United States relief and contravenes enduring principles of state sovereignty over intrastate waters.

III. New Mexico allows for conjunctive administration of ground and surface water in order to afford full utilization of the State's water resources while protecting senior water rights. Permitting development of available groundwater, while protecting prior existing rights, promotes beneficial use of the State's public waters. By recommending that New Mexico relinquished sovereignty over surface water, the Report would create a disjointed and unworkable administrative scheme.

IV. Finally, allowing the United States to reassert "claims under federal reclamation law on behalf of the Rio Grande Project", Report at 237, would not promote judicial economy and would trample on the rights of parties to the ongoing state proceeding. In 2002, the Tenth Circuit firmly criticized the United States for its repeated attempts to circumvent the authority of the LRG Adjudication: "The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction." *City of Las Cruces*,

289 F.3d at 1189-1190. This Court should not allow relitigation of the same claims the Tenth Circuit in *Las Cruces* decided 15 years ago should be determined in the state court and which the state court has now determined. Permitting another bite at the apple would cause the very piecemeal litigation the Court warned against in *Colorado River* and would deny thousands of other claimants not joined in this case the opportunity to contest a competing right.

ARGUMENT

I. The Report ignores the existence of long-held and valid groundwater rights in the Mesilla Valley of New Mexico.

The Report depicts the Rio Grande Valley between Elephant Butte Reservoir and Fort Quitman, Texas as a pristine irrigation valley with no room for further human development after 1938. The Report implies that even senior groundwater right holders like NMSU, with a water right established almost 50 years before the Rio Grande Compact and senior to the Rio Grande Project, are left high and dry because Project supply "takes priority over all other appropriations granted by New Mexico." See Report at 213. This view conflicts with New Mexico's right to allocate and administer its public waters. It also diverges from the accepted and lawful practice on both sides of the state line of developing and using groundwater. The City of El Paso and other water users in El Paso County rely heavily on groundwater. In the Mesilla Valley of New Mexico all

non-agricultural uses are supplied by groundwater. A population of over 200,000 New Mexican residents relies on groundwater for domestic and municipal supply. See United States Census, Population estimates, July 1, 2016 (V2016). More than a thousand irrigators, including NMSU, who are members of Elephant Butte Irrigation District, pump groundwater to supplement surface water for their farmlands. In addition to its agricultural uses, NMSU has continually used groundwater to supply its campus population since 1890, including by installation of a pulsometer steam-powered pump in 1892. *New Mexico State University Water Plan 2002-2042: Including a History of Land and Water Resource Development from 1888-2002* (June 2003), III-12 & -16 (available: http://facilities.nmsu.edu/wpcontent/uploads/sites/57/2013/09/NMSUWaterPlan2003.pdf).

Like most Western States, New Mexico law recognizes a water right to divert and beneficially use groundwater. In 1931, the New Mexico legislature extended the state water code to underground waters, declaring water in underground streams, channels, artesian basins, lakes, and reservoirs having reasonably ascertainable boundaries to be public waters subject to appropriation for beneficial use. N.M. Stat. Ann. § 72-12-1 (1931) (the groundwater code is contained in Article 12 of Chapter 72 of the New Mexico Statutes Annotated 1978). Section 4 of the groundwater code specifically recognized groundwater rights already in existence, proclaiming: "Nothing herein contained is intended to impair the same or to disturb the priorities

thereof." § 72-12-4 (1931). In 1949, the New Mexico legislature granted the State Engineer authority over groundwater appropriations from any underground basin declared by the engineer to have "reasonably ascertainable" boundaries. N.M. Stat. Ann. § 72-12-12 (1949). The State Engineer has carried out the process of making such declarations basin by basin and now all underground basins within the State fall under the State Engineer's authority. The State Engineer declared the Lower Rio Grande Basin of New Mexico in 1980. New Mexico Office of the State Engineer, Memorandum, Subject: Lower Rio Grande (Sept. 10, 1980). See *City of El Paso v. Reynolds*, 563 F. Supp. 379, 380 (D.N.M. 1983).

Although the groundwater code was not included in the 1907 state water code, the New Mexico Supreme Court has held time after time that a right to groundwater stands on equal footing with a right to surface water:

> This thought stands out in the opinion and holding of the court, namely, that legislative enactments classifying such waters as public and subject to appropriation are merely declaratory of the state of the law prior to such legislation and that except for any differences compelled by their subterranean character, such waters are affected with all the incidents of surface waters as to use, appropriation and administration.

Pecos Valley Artesian Conservancy Dist. v. Peters, 173 P.2d 490, 501 (N.M. 1945) (citing *Yeo v. Tweedy*, 286 P.

970, 974 (N.M. 1929)). See *State ex rel. Reynolds v. Mendenhall*, 362 P.2d 998, 1002 (N.M. 1961) (general law of appropriation applies equally to ground and surface water); *City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (N.M. 1962) (substantive rights to surface and underground water identical).

The Special Master's Report does not adequately consider groundwater as a source of supply distinct from surface water. The Report at the beginning of its section IV recites Texas's allegation that New Mexico is allowing "pumping of groundwater that is hydrologically connected to the Rio Grande", *id.* at 187, and in section V twice recites the United States' allegation that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande", *id.* at 217, 232 (quoting portions of respective complaints). But what is the import of these allegations? The Report does not say. In neither section IV nor V does the Report discuss groundwater or rights thereto. The word "groundwater" does not even appear again in either section. In section V the Report mentions "seepage and return flows" in discussing federal reclamation projects. *Id.* at 232. Nowhere does the Report take on the crucial question of how use and administration of ground and surface water should be managed in an interconnected basin. As discussed in section II below, the Report misses an entire body of water law dealing with unified administration of water rights and never cites or discusses the McCarran Amendment or the Court's seminal federalism holdings in *Colorado River* and

California v. United States. The Report seems merely to assume that ground and surface water are the same resource, even though the LRG Adjudication found otherwise, as discussed below.

To be sure, NMSU does not dispute that use of hydrologically interconnected ground and surface water must be reconciled to protect senior appropriators and to comply with compact obligations. See *Kansas v. Nebraska*, __ U.S. __, 135 S. Ct. 1042, 1050 (2015) (to the extent Nebraska's groundwater pumping depleted stream flow in the basin, it counted against its annual allotment of water under the Republican River Compact). Nonetheless, available groundwater in storage is a precious resource that can and should be put to beneficial use. As discussed in section III below, New Mexico law provides for integrated or conjunctive use of ground and surface waters in order to make beneficial use of the State's scarce water resources.

Within the lower Rio Grande of New Mexico, the Mesilla Valley has substantial groundwater in storage that predates by many millennia either the Project or the Compact.[3] The saturated aquifer thickness of the

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[3] For a good discussion of the hydrogeology of the Mesilla groundwater basin, see: (1) Hawley, J.W., Kennedy, J.F. and Creel, B.J., 2001, The Mesilla Basin Aquifer System of New Mexico, West Texas, and Chihuahua – An Overview of Its Hydrogeologic Framework and Related Aspects of Groundwater Flow and Chemistry; in Mace, R.E., Mullican, W.F. III, and Angle, E.S. (eds.), Aquifers of Texas: Texas Water Development Board Report 356, pp. 76-99 ("*Texas Water Development Board Report 356*") at 91 (available: https://www.twdb.texas.gov/publications/reports/numbered_reports/

Mesilla Basin or "Bolson" varies up to a maximum of 3,000 feet in depth, with most-productive aquifer zones ranging in depth from 300 to 2,000 feet. *Texas Water Development Board Report 356* at 91. The aquifer extends across an area of 500 square miles and contains more than 60 million acre-feet of "recoverable fresh to moderately brackish groundwater in storage" mostly underlying the Mesilla Valley of New Mexico. *Brackish Groundwater Resource Development in New Mexico* (2016) at 3. The Mesilla Basin straddles the course of the ancestral Rio Grande before it shifted miles to the east to its current course. *Texas Water Development Board Report 356* at 92. The geologically youngest upper layer of the Mesilla Basin formed from sedimentary deposits near the end of the Late Pleistocene ice age, 15 to 30 thousand years ago. *Id.* at 91.

The Project did not appropriate and the Compact did not apportion this groundwater. In 2012, the LRG Adjudication court ruled that the Project right is a surface water right and does not include groundwater: "The points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to surface

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doc/R356/Chapter7.pdf); and (2) Hawley, J.W., Challenges and Opportunities for Brackish Groundwater Resource Development in New Mexico – Prediction Hydro-Science from an Octogenerian Hydrologist's Perspective; Urban Land Institute-New Mexico Section, April 28, 2016 (*"Brackish Groundwater Resource Development in New Mexico (2016)"*) (available: http://aquadoc.typepad.com/files/uli-nm_whitepaper.pdf).

water under New Mexico law for purposes of the adjudication." Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 4-6, LRG Adjudication (Aug. 16, 2012) ("2012 LRG Order"). Likewise, no provision of the Compact apportions groundwater. See *City of El Paso*, 563 F. Supp. at 387.

Conclusions in the Report that the State of New Mexico has lost control over water compacted to it, that state law no longer applies, and that non-Project water rights are by implication invalid without a federal contract, *id.* at 211-217, call upon this Court to cast aside prevailing law and practice and void vested and relied upon real property in the form of vital water rights. If the Report's view is correct, NMSU and all other institutions, communities, commerce and industries, and thousands of individual residences supplied with groundwater should have packed up in 1938 and left the Mesilla Valley. The City of Las Cruces should have moved somewhere else. But that thought never occurred to anyone. Because of economic enterprise and population growth, the Mesilla Valley has developed into a vibrant region and the State's second most populated. All non-agricultural water users and all farms with irrigation wells depend on groundwater. No one has ever told NMSU that in 1938 the Compact supplanted the University's water rights and that it must request a federal contract to continue using state groundwater. The University has substantial relationships with agencies and institutions of the

federal government and the State of Texas and not once has anyone from those entities asserted that the Compact invalidated NMSU's use of groundwater.

The State of New Mexico recognizes NMSU's pre-existing water right. In 2007 the court in the LRG Adjudication entered a consent order between NMSU and the State confirming a priority date of 1890 for the University's main campus groundwater right. Subfile Order, LRG Adjudication, Subfile No. LRN-28-014-0001 (Nov. 9, 2007). NMSU believes this right to be valid and not subject to curtailment because of shortages to subsequent surface water uses or because of any provision of the Compact. By the time Elephant Butte dam was constructed in 1916, NMSU had been using groundwater for a quarter century, and nearly a half century by 1938 when the Compact was adopted. This preexisting right should be protected. See *Colorado v. New Mexico*, 459 U.S. 176, 188 (1982) (finding in equitable apportionment context "equities supporting the protection of established, senior uses are substantial"). The Report's conclusion that Project supply "takes priority over all other appropriations granted by New Mexico[,]" *id.* at 213, would rob NMSU of its senior groundwater right.

Moreover, if the Report envisions a pristine, undeveloped agricultural valley in New Mexico, it does not explain why the same vision does not extend into Texas. Water users in El Paso County make extensive use of groundwater, and no one doubts that the laws of Texas recognize such rights. The course of conduct between Texas and New Mexico after the adoption of the

Compact demonstrates that both States understood the development of groundwater to be compatible with the terms of the Compact, so long as obligations to make surface deliveries were met. See *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010) ("the parties' course of performance under the Compact is highly significant"); *Tarrant Regional Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120, 2135 (2013) (course of performance highly significant evidence of understanding of compact's terms). After ratification of the Compact, the Rio Grande Compact Commission adopted rules and regulations. *Rules and Regulations for Administration of the Rio Grande Compact* (Feb. 29, 1940) (NM Motion to Dismiss, App. 34). The preamble declared: "A Compact, known as the Rio Grande Compact, between the States of Colorado, New Mexico and Texas . . . which equitably apportions the waters of the Rio Grande above Fort Quitman and *permits each State to develop its water resources at will, subject only to its obligations to deliver water in accordance with the schedules set forth in the Compact. . . .*" *Id.* at 1 (emphasis added). Since that time both States have made extensive development of their respective groundwater resources, in accordance with their respective state laws.

II. The Report overlooks state and federal laws that require unified adjudication and administration of water rights in accordance with state law.

The Report proposes to strip New Mexico of jurisdiction over surface water in favor of the U.S. Bureau of Reclamation, at 213-217. Under this line of thinking, a federal agency will administer surface water while the State continues to administer groundwater. Such an outcome would split the proverbial baby. It would contravene federal and state law requiring unified adjudication and administration of a shared resource and would create an unworkable regulatory scheme. It would trample on the State's rights, contrary to the "cooperative federalism" afforded to all Western States. *California v. United States*, 438 U.S. at 650-651 (citing Section 8 of the Reclamation Act of 1902).

By enactment of the McCarran Amendment, Congress expressly waived the United States' sovereign immunity to be joined as a party in comprehensive stream system adjudication suits and for the administration of such rights:

> Consent is given to join the United States as a defendant in any suit (1) for the *adjudication* of rights to the use of water of a river system or other source, or (2) for the *administration* of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law . . . and the United States is a necessary party to such suit. . . .

43 U.S.C. § 666(a) (emphasis added). In interpreting the McCarran Amendment to require deference to state court adjudication of federal water claims in the San Juan Basin of Colorado, this Court explained:

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.

Colorado River, 424 U.S. at 819 (citation omitted).

The Court also upheld the State of California's imposition of conditions on its approval of an appropriation to the United States from the Stanislaus River for impoundment in the New Melones Dam, part of the federal reclamation irrigation project serving California's central valley. *California v. United States*, 438 U.S. 645 (1978). In considering the United States' challenge to the State's conditions, the Court reviewed the long history of deference by federal statutes to state control over water resources: beginning with the Homestead Act of 1862, the Mining Act of 1866 and the

Desert Land Act of 1877, *id.* at 655-658; continuing to the Reclamation Act of 1902, *id.* at 663-674; and culminating with the McCarran Amendment in 1952, *id.* at 678. The Court summed up the federal-state relationship: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653. See *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-703 (1899) (territory of New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande upheld; the "Court unhesitatingly held that 'as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.'" (quoted in *California v. United States*, 438 U.S. at 662)).

In emphasizing federal deference to state authority over water, the Court in *California v. United States* adopted the rationale behind the McCarran Amendment. "Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666, which subjects the United States to state-court jurisdiction for general stream adjudications:"

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is

> to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> . . .
>
> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

Id. at 678-79 (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951)). See also *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law).

New Mexico's constitution and statutes assert control by the state over its waters. N.M. Const. art. XVI, § 3; N.M. Stat. Ann. 1978, Chapter 72. See *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957) ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. . . . The state as owner of water has the right to prescribe how it may be used."). In particular, the state water code confers supervision of the State's water on the State Engineer, N.M. Stat. Ann. Chapter 72, Article 2,

and authorizes and mandates adjudication of state waters under state law, *id.* N.M. Stat. Ann. §§ 72-4-14 through -19 (1907). Consistent with the McCarran Amendment, the State's adjudication statutes require a comprehensive and unified proceeding:

> In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. . . . The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved. . . .

N.M. Stat. Ann. § 72-4-17 (1907). See *United States v. Bluewater-Toltec Irrig. Dist.*, 580 F.Supp. 1434, 1438 (D.N.M. 1984), affirmed, 806 F.2d 986 (10th Cir. 1986) (suit under New Mexico adjudication statutes satisfied McCarran Amendment's comprehensiveness requirement); *Colorado River*, 424 U.S. at 804 n. 2 (in context of satisfying McCarran Amendment requirement, noting that New Mexico statutes and other southwestern States have "elaborate procedures for allocation of water and adjudication of conflicting claims to that resource").

The Third Judicial court of New Mexico has entered its third decade adjudicating all water rights in

New Mexico's lower Rio Grande. Since ordering realignment of the State as plaintiff in 1996, the LRG Adjudication has made considerable progress: completing a basin-wide hydrographic survey of all water uses; joining more than 16,000 claimants; entering individual subfile orders; entering subfile orders of rights of public water users NMSU and the City of Las Cruces; and resolving major stream system issues, including a final decision on the United States' claims to the Rio Grande Project within New Mexico. Stream System Issue No. SS-97-104, 2012 LRG Order, Order Regarding Quantity (Feb. 17, 2014) and Findings of Fact and Conclusions of Law (granting U.S. claim of early priority date of 1903) (April 17, 2017) ("2017 LRG Order").

The New Mexico Court of Appeals and the Tenth Circuit have each rejected challenges by the United States to the state court's jurisdiction over the United States in the LRG Adjudication. In what is already a long and expensive process, NMSU and other parties were forced to defend the state court's right to conduct the adjudication. In 1990, the United States filed a motion seeking dismissal of the case asserting a single adjudication of the entire Rio Grande of New Mexico was necessary to meet the comprehensiveness requirement of the McCarran Amendment. In *Regents of New Mexico State University*, the New Mexico Court of Appeals upheld the district court's denial of the motion, finding the lower Rio Grande of New Mexico is a separate stream system in compliance with the McCarran Amendment and the state adjudication statutes. 849

P.2d at 378-379. The court underscored that "both statutes are intended to avoid piecemeal litigation by including all claimants to the water source." *Id.* at 379 (citing *Colorado River*, 424 U.S. at 819 and *State ex rel. Reynolds v. Lewis*, 545 P.2d 1014 (N.M. 1976)).

Similarly, the Tenth Circuit in *City of Las Cruces* rejected the United States' separate suit filed in U.S. district court of New Mexico to quiet title to its water rights in the Project. After concluding that New Mexico law applies to the determination of the federal claim in New Mexico, *id.* at 289 F.3d at 1176, 1186, the court upheld the federal district court's decision abstaining jurisdiction in favor of the ongoing LRG Adjudication. *Id.* 1191-92. The Tenth Circuit explained:

> There are thousands of water users in New Mexico who may assert a right to Project water just as New Mexico State University and Stahmann Farms have in this case. Their claims will be adjudicated in the comprehensive New Mexico stream adjudication. By declining jurisdiction, the district court avoided a piecemeal approach to adjudicating the rights of the United States vis-a-vis innumerable water users in New Mexico. The district court acted within its discretion in determining that the United States' claims against the named defendants and other water users would be better settled in a unified proceeding.

Id. at 1187. Noting the purpose of the McCarran Amendment to "adjudicate the interlocking rights of all users" in state court, the Tenth Circuit warned

"chaos could result in this case if the United States is permitted to litigate its claim in federal court." *Id.* at 1191. This is exactly what will happen in this original action if the United States (1) is allowed to assert claims here that belong, and have already been decided, in the LRG Adjudication or (2) is granted administration over surface water in the lower Rio Grande of New Mexico.

The Special Master's Report simply does not consider this significant body of law. It does not cite or discuss the McCarran Amendment, *California v. United States*, *Colorado River*, the New Mexico adjudication statutes or the *Regents of New Mexico State University*. It misses this well-developed and long-accepted body of law requiring deference to comprehensive state adjudication and administration of state waters. See *New Jersey v. New York*, 523 U.S. 767, 808-809 (1998) (accepted legal principles inform compact interpretation); *Tarrant*, 133 S. Ct. at 2132-33 (compact's silence does not mean signatories had "dispensed with the *core state prerogative* to control water within their own boundaries.") (emphasis added). Instead, after omitting this important pillar of western water law, the Report simply concludes that New Mexico "as a quasi-sovereign, relinquished its own rights" over its own compacted surface water, *id.* at 216, in favor of the U.S. Bureau of Reclamation, *id.* at 217, and that "New Mexico state law does not govern the distribution of water apportioned by Compact[,]" even to New Mexico. *Id.* at 216. The Report acknowledges that "it may seem

strange" that New Mexico has relinquished sovereignty over its own compacted water, but nevertheless plows ahead, citing as its only authorities for this astonishing proposition *Alamosa-La Jara v. Gould*, 674 P.2d 914 (Colo. 1984) (cited by the Report as *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*) at 214, 216, and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938), at 212, 213, 216. These two cases do not support the Report's conclusion. They support the opposite. Both cases stand for the principle that state laws govern the administration of intrastate waters.

Finally, if the Compact deprived New Mexico of sovereignty over its water, as the Report concludes, the Report does not explain how Texas retained jurisdiction over its waters within Texas. If Texas likewise committed its compacted water to the Project, then it stands to reason that Texas also relinquished its sovereignty over its compacted surface water within Texas. But the State of Texas does not think so, and rightfully continues to adjudicate and administer its water. See *In re: Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, Cause No. 2006-3219 (327th Dist. Ct. El Paso Cnty., Tex. 2006), *decree issued* Oct. 30, 2006 (adjudicating the Project right for the Texas portion). The Tenth Circuit described application of the respective States' laws this way: "The United States asserts title to Project

water under either New Mexico or Texas law, depending on which right is asserted. There is, however, no uncertainty over which state's laws applies to determine the United States' rights." *City of Las Cruces*, 289 F.3d at 1176. Within New Mexico, its state law mandates unified adjudication and administration over its water by its court and State Engineer, respectively. The state water code in no instance grants supervisory authority to the federal government.

III. In order to make beneficial use of its groundwater, New Mexico conjunctively administers ground and surface water.

In the pivotal New Mexico case of *City of Albuquerque v. Reynolds*, the New Mexico Supreme Court considered the interrelationship between ground and surface water. 379 P.2d 73 (N.M. 1962). Along the Rio Grande where ground and surface water are interrelated, the court held that New Mexico law requires the administration of ground and surface water rights conjunctively to protect senior rights as required by the State's prior appropriation doctrine. *Id.* at 79-81. Thus, the court upheld the State Engineer's permit granting Albuquerque a new appropriation of groundwater conditioned on not impairing prior existing water rights. *Id.* at 81. To avoid impairment, the permit required the City to secure surface water rights or demonstrate return flows to the Rio Grande sufficient to offset pumping effects of the new groundwater appropriations on surface flows. *Id.* 71, 78.

Historically in New Mexico, appropriations of surface water occurred in large quantities before advances in technology allowed high volume groundwater wells. See Ira G. Clark, *Water in New Mexico, A History of its Management and Use*, University of New Mexico Press (1987), Chapter 14, "Groundwater in Ascendency" at 240-242. Nonetheless, State Engineer records reveal many examples of early groundwater wells drilled prior to subsequent surface appropriations. See, e.g., Albuquerque Electric Company (now Public Service Company of New Mexico), OSE License No. RG-50 (priority date 1903); University of New Mexico, OSE File No. RG-551 (priority date 1904); Roswell-Artesia area (priority dates 1891, 1903), *Water Matters!*, Chapter 16 "Groundwater in New Mexico" (2013), Utton Center, University of New Mexico Law School, at 16-1, (available: http://uttoncenter.unm.edu/pdfs/WaterMatters2013/Groundwater%20in%20NM%20.pdf). With a priority date of 1890 for its main campus groundwater right, NMSU owns and relies on a water right that predates most other priority dates in the Mesilla Valley including surface water priorities. In such instances of early groundwater development, the hydrologic effects of senior groundwater pumping on surface flows do not constitute impairment of later surface appropriations because, as *Albuquerque v. Reynolds* explained, "[p]riority of appropriation shall give the better right[,]" whether the source is surface water or groundwater. 379 P.2d at 82 (quoting art. XVI, § 2, Constitution of New Mexico). In *Albuquerque v. Reynolds* the court contrasted the City's application for a new appropriation with the City's historical rights, the exercise of

which does not require offset of effects on surface water. *Id.* at 76, 83. See *Mendenhall*, 362 P.2d 998, 1003 (groundwater statute's requirement of State Engineer permit for new groundwater appropriations did not apply to prior existing groundwater rights; "'existing * * * rights based upon application to beneficial use' were 'recognized' and the provisions of the statute were not intended to 'impair' or 'disturb the priorities thereof.'" (quoting section now codified as N.M. Stat. Ann. § 72-12-4)).

Albuquerque v. Reynolds demonstrates further that, even where appropriable surface water may be fully spoken for, it may be both lawful and desirable to permit new appropriations of interrelated groundwater as a means of fully utilizing the State's water resources. The case directly addressed the circumstance, as in the lower Rio Grande, where an underground basin contains substantial unappropriated groundwater in storage but the connected surface body is fully appropriated. The State Engineer found:

> * * * The scientific considerations discussed hereinabove show clearly that accretions from the underground reservoir constitute a major source of the fully appropriated surface water supply of the Rio Grande. These considerations also show that over a 75-year period about one-half of the water proposed to be taken would be extracted from surface flows and about one-half would be taken from underground storage. Much of the water in storage in the Rio Grande underground reservoir

> is unappropriated and may be taken for beneficial use under an application properly formed to insure against the impairment of existing surface water rights.

379 P.2d at 78. Because groundwater pumping takes part, and in some instances all, of its supply from water in underground storage, pumping may not diminish stream flow at a 1-to-1 ratio, as this Court recognized in *Kansas v. Nebraska*, 135 S. Ct. at n.1, 1060 ("In other words, a State can pump a bucketful of groundwater without reducing stream flow by the same amount.").

In granting a new application to Albuquerque conditioned on return flows and retirement of surface rights sufficient to offset effects on the Rio Grande, the State Engineer explained: "Under proper application the appropriator may take advantage of ground water that can be removed from storage without impairment of existing rights[.]" *Id.* In upholding this conjunctive approach, the New Mexico Supreme Court reasoned:

> If we assume, as we must, from the findings made by the state engineer and also by the district court that the underground waters in question cannot be taken without impairment to the rights of the river appropriators, even though there are unappropriated underground waters in the basin, then it would seem to follow that some method should be devised, if possible, whereby the available unappropriated water can be put to beneficial use.

Id. at 80-81.

Permitting development of available groundwater, while protecting prior existing rights, promotes beneficial use of the State's public waters. "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. See *Kaiser Steel Corp. v. W. S. Ranch Co.*, 467 P.2d 986, 989 (N.M. 1970) ("Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for *maximum benefits* is a requirement second to none, not only for progress, but for survival." (emphasis added)); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34 (10th Cir. 1981) (utilization for maximum benefits is a requirement second to none in determining whether water is being used for a beneficial use under New Mexico's permit system of prior appropriation) (citing N.M. Stat. Ann. § 72-1-2 and N.M. Const. art. XVI, § 3).

The State's law and practice governing the conjunctive use of ground and surface water apply to the State's lower Rio Grande. After the State Engineer declared the Lower Rio Grande Basin in 1980, applicants could still legally appropriate available groundwater but subject to a permit condition of offsetting effects on the Rio Grande. As set forth in the State's current administrative rules governing the Mesilla Valley Administrative Area ("MVAA"), "[t]he State Engineer has developed administrative criteria in order to assure the orderly development of water resources within the MVAA, while meeting statutory obligations regarding non-impairment of existing water rights. . . ." MVAA

Guidelines for Review of Water Right Applications (Jan. 5, 1999) at 2 (available: http://www.ose.state.nm.us/RulesRegs/lrg-criteria/MesillaValleyGuidelines-2007-01-05.pdf). Except for *de minimis* uses, the rules provide that permitted groundwater appropriations "must offset 100% of the surface water depletions caused by the appropriation." *Id.* at 4. Although the LRG Adjudication ruled that the Project does not have a groundwater right, the court recognized the conjunctive administration of ground and surface water under New Mexico law: "the United States may pursue any administrative action available under New Mexico law to protect its right from other appropriations, pending or existing, that encroach upon its right." 2012 LRG Order at 4. As the U.S. District Court found in *City of El Paso*, although Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply," this did not preclude the New Mexico State Engineer from "conjunctively manag[ing] the surface and ground water in the Lower Rio Grande System." 563 F. Supp. at 387.

The New Mexico Legislature has specifically found that "compliance with interstate compacts is imperative" and therefore granted authority to the State Engineer to administer water rights where, as in the lower Rio Grande, a final adjudication has not been completed and administration of water rights may be required. N.M. Stat. Ann. § 72-2-9.1 (2003). That authority was confirmed by the New Mexico Supreme Court in *Tri-State Generation & Transmission Ass'n,*

Inc. v. D'Antonio, 289 P.3d 1232, 1235 (N.M. 2012). Pursuant to the legislative grant, the State Engineer promulgated regulations requiring Active Water Resource Management, *id.*, and has identified the lower Rio Grande as a priority area in order to comply with the Compact and protect senior appropriators. In the event any senior appropriator claims impairment by a junior, New Mexico law and administration are fully equipped to evaluate the claim and afford relief. By administering ground and surface water rights together, New Mexico has allowed development of groundwater consistent with state law and the Compact.

The Report's conclusion that New Mexico relinquished sovereignty over surface water would create a disjointed and unworkable administrative scheme. By ignoring administration of groundwater the Report fails to consider the consequent split of administration of the interconnected resource: the U.S. Bureau of Reclamation takes over administration of New Mexico's surface water and the state continues to administer groundwater. Such a split is legally and practically untenable. "A principal motivating factor behind Congress' decision to defer to state law was thus *the legal confusion that would arise if federal law and state water law reigned side by side in the same locality*." *California v. United States*, 438 U.S. at 668-669 (emphasis added).

IV. The United States has repeatedly sought to avoid state authority over its water claims in the lower Rio Grande of New Mexico and should not be permitted to make claims under reclamation law in this Court that properly belong in the state forum.

The Special Master's Report recommends the Court grant New Mexico's motion to dismiss the United States' Complaint in Intervention because "the United States cannot state a plausible claim under the 1938 Compact" but then recommends the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) "to the extent that the United States has stated plausible claims under federal reclamation law on behalf of the Rio Grande Project . . . to allow for the resolution by the Court of the United States' project claims to occur simultaneously with the resolution of Texas's compact claims against New Mexico." Report at 237. The Report reasons that resolution of the United States' claims by the Court is "desirable due to the interstate nature of the Rio Grande Project." *Id.* at 234.

NMSU does not contest the Report's recommendation to hear the United States' claims, so long as those claims are necessary for resolution of the compact claims in this case. This Court, however, should not agree to hear claims that duplicate federal claims already before the LRG Adjudication court or to grant relief already within the administrative authority of the State of New Mexico. Despite the "interstate nature of the Rio Grande Project", *id.* at 234, the United

States' complaint targets activity entirely within the State of New Mexico. See Compl. in Intervention, ¶ 13 ("New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts. . . ."). It appears to NMSU that the United States' claims are for the most part a repackaging of its intrastate claims, and even if this Court accepts jurisdiction to hear the claims it should ultimately defer or abstain in favor of the ongoing judicial proceedings and existing administrative procedures in New Mexico. This Court should be "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum." *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

The state court and the parties have worked for more than 25 years to position the LRG Adjudication to determine stream system issues, in particular the United States' interests in the Project in New Mexico. Earlier this year the LRG Adjudication completed adjudication of those interests in Stream System Issue No. SS-97-104. The United States, however, has repeatedly resisted the state court's authority. From the inception of the LRG Adjudication in 1986, the United States fought jurisdiction in state court, first by filing a motion to dismiss for lack of jurisdiction under the McCarran Amendment and then later by filing a second motion re-arguing that the lower Rio Grande in New Mexico does not constitute a "river system," as

required by McCarran. The district court denied the motions and the United States appealed. As discussed above in section II, the New Mexico Court of Appeals upheld the district court's decision in *Regents of New Mexico State University*, 849 P.2d 372 (Ct. App. 1993).

In 1996, the State Engineer undertook a comprehensive hydrographic survey of the basin in order to move forward with adjudication of all water rights claims. In 1997, the United States sued seven parties, including NMSU, in the U.S. District Court of New Mexico seeking to quiet title in itself to virtually all waters of the Project. See *United States v. Elephant Butte Irrigation District, et al.*, Cause No. 97-0803 JP/RLP (D.N.M.), Complaint filed June 12, 1997. The federal suit resulted in a five-year delay. NMSU and other defendants succeeded in moving the federal district court to abstain from hearing the United States' claims, in deference to the state court proceedings, under the federal abstention doctrine. In applying the factor-test under the abstention doctrine, the federal district judge observed:

> I am concerned that the United States may be using this case for "procedural fencing." Since the inception of the state adjudication, the United States has attempted to avoid the jurisdiction of the state court on several occasions. . . . I find it significant that the United States filed this federal court action shortly after losing on the issue of jurisdiction the last time in state court.

Memorandum, Opinion and Order, Aug. 22, 2000, at 24-25. Upon appeal by the United States to the Tenth Circuit, NMSU and other defendants prevailed in sustaining the federal district court's holding. *City of Las Cruces*, 289 F.3d 1170. The Tenth Circuit firmly rebuffed the United States' attempt to circumvent the authority of the state court, similarly observing:

> The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction. . . . After an extended period of pleadings and dismissal motions in the New Mexico proceedings and after realignment, the New Mexico stream adjudication is progressing rapidly. In the three years since the realignment and the denial of the State Engineer's last motion to dismiss, the parties have been cooperating; none have questioned the state court's jurisdiction. Only the United States and Texas parties still resist the stream adjudication.

Id. at 1189-1190.

After rejection by the Tenth Circuit of the federal quiet title suit in 2002, the state court developed exhaustive case management orders and directed the State to join and serve with offers of judgment the many thousands of claimants. When it became clear that the process of serving individual offers of judgment would take many years, the court ordered the State to join all claimants, even if separate offers of judgment would have to be served separately later.

Consequently, the State spent two years and significant resources to join more than 16,000 claimants as parties to the LRG Adjudication so that binding proceedings on basin-wide or stream system issues could go forward. The Court then began designating a number of Stream System Issues for resolution. By Order entered January 8, 2010, the court designated the interests of the United States in the Project as Stream System Issue No. 104, to be adjudicated by expedited *inter se* proceeding. Order Designating Stream System Issue/Expedited *Inter Se* Proceeding No. 104 (Jan. 8, 2010). After ruling against the United States that the source of supply for the Project did not include groundwater, 2012 LRG Order, the court recently ruled in favor of the United States' claimed priority date. 2017 LRG Order (granting U.S. claim of early priority date of 1903). The LRG Adjudication has now completed determination of the United States' interests in the Project within New Mexico.

In spite of completion of adjudication of the United States' claims, it appears the United States is taking advantage of the instant proceeding to avoid the State of New Mexico's jurisdiction once again. As the Report observes:

> . . . the crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses and to protect its ability to

> deliver Project water to its consumers as required by contract or by convention.

Report at 219-220 (citing U.S. Complaint in Intervention, ¶¶ 13-15). As the Report also observes: " . . . resolution of an entirely intrastate issue was appropriately resolved under that State's law by the State Engineer." *Id.* at 235 (making comparison to Klamath Project). Yet the Report recommends the Court hear these intrastate claims "for purposes of judicial economy", noting "Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues." *Id.* at 234.

The opposite is true. Allowing the United States to re-assert "claims under federal reclamation law on behalf of the Rio Grande Project", Report at 237, would simply allow for re-litigation of claims the Tenth Circuit in *Las Cruces* decided 15 years ago should be determined in the state court and which now the LRG Adjudication has fully adjudicated. It is not possible for resolution of the federal claims in New Mexico to "occur simultaneously with the resolution of Texas's compact claims against New Mexico", *id.* at 237, because the former have already been resolved. To attempt otherwise would cause the very piecemeal litigation the Court warned against in *Colorado River* and would deny thousands of other claimants not joined in this original action the opportunity to contest a competing right.

CONCLUSION

NMSU respectfully asks the Court to reject the Report's reasoning that New Mexico relinquished control over its own groundwater and implicitly that New Mexico groundwater rights are invalid, and specifically reject conclusions that: (1) the water committed to New Mexico by the 1938 Compact "is not subject to appropriation or distribution under New Mexico state law[,]" *id.* at 211; (2) water committed to the Rio Grande Project for use in New Mexico "takes priority over all other appropriations granted by New Mexico[,]" *id.* at 213; (3) "New Mexico itself, as a quasi-sovereign, relinquished its own rights to the water it delivers in Elephant Butte Reservoir. . . . New Mexico state law does not govern the distribution of the water apportioned by Compact[,]" *id.* at 216; and (4) "Therefore, New Mexico . . . is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact . . . requires the water at that point be controlled and delivered to its destinations by Reclamation." *Id.* at 217. Therefore, the Court should not hold that any groundwater user in New Mexico's lower Rio Grande must obtain a permit from or contract with Reclamation. See Report at 232. Finally, NMSU asks the Court to refrain from hearing the Unites States' reclamation claims and to hear only federal claims

necessary for resolution of the Compact claims in this original action.

Respectfully submitted,

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